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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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SUBJECT INDEX

PAGE

Statement 2

Argument 5

I. The Judgment of the Ohio Supreme Court Was General and Might Have Been and Presumably Was Based on an Arguable Non-Federal Ground of Defense. So, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained 5

II. The Motion to Certify Should Be Overruled Because Lack of Tender and Claim of No Actionable Fraud Are Defenses Involving the State Law of Ohio and (A) An Action to Set Aside a Settlement, Release and Judgment Embodying Same Cannot Be Maintained Without Tender of the Consideration Received (Which Was Not Made Here); and (B) The Fraud Alleged Is (1) Substantially an Expression of Legal Opinion Only and (2) Not Something Plaintiff Had a Right to Rely On. Having Competent Legal Advice, She Was Bound to Know, Treating Her Allegations as True, the Trust Was a Fraudulent Assignment to Defeat Her Rights as a Creditor and Could Be Set Aside for That Reason 7

III. The Federal Question If Presented for Consideration, Lacks Merit, Is Unsubstantial and Not Debatable. The Fraud Alleged Is Intrinsic and the Decree May Not Be Attacked for Intrinsic Fraud 11

Conclusion 12

TABLE OF CASES

	PAGE
Adler v. Adler, 373 Ill. 361 (1940)	11
Aetna Ins. Co. v. Reed, 33 O. S. 283 (1877)	10
Atkinson v. Jordan, 5 Ohio 293 (1832)	11
Babcock v. Farwell, 245 Ill. 14 (1910)	9
Barnard v. Michael, 392 Ill. 130 (1945)	11
Block v. Block, 163 O. S. 230 (1955)	4
Cantrell v. City of Cruthersville, 222 F. (2d) 428, 429 (C. A. 8th, 1955)	6
Centrello v. Basky, 164 O. S. 41, 49, 53 (1955)	6
Coe v. Coe, 334 U. S. 378 (1948)	11
Cross v. Ledford, 161 O. S. 469 (1954)	9
Dice v. Akron, Canton & Youngstown Rd. Co., 155 O. S. 185 (1951)	9
Durham v. New Amsterdam Cas. Co., 208 F. (2d) 342 (C. A. 4th, 1953)	11
Ellis v. Dixon, 349 U. S. 458, 75 S. Ct. 850 (1955)	5
Forrest v. Fey, 218 Ill. 165 (1905)	11
Franceschi v. Franceschi, 326 Ill. App. 494 (1945)	11
Hays v. Lindquist, 22 O. App. 58 (1926)	11
In re Estate of Gray, 162 O. S. 384, 391 (1954)	9
Johnson v. Muelberger, 340 U. S. 581 (1951)	11
Kut v. Bureau of Workmen's Compensation, 329 U. S. 669 (1946)	5
Lape v. Lape, 99 O. S. 143, 151 (1918)	6
Lawlor v. National Screen Service Corporation, 349 U. S. 322 (1955)	11
Lees v. Akshun Mfg. Co., 205 F. (2d) 577, 583 (C. A. 7th, 1953)	9
Michael v. American National Bank, 84 O. S. 370 (1911)	11
Mulcahy v. Akron, 111 O. S. 836 (1924)	6
Nichols v. Nichols, 306 N. Y. 490 (1954)	11
Peters v. Hobby, et al., 348 U. S. 882 (1955)	5
Picklesimer v. B. & O. R. R. Co., 151 O. S. 1 (1949)	9

PAGE

Potter v. Baker, 162 O. S. 488, 503 (1955) 6
Pritz v. Messer, 112 O. S. 628 (1925) 6
Rehill v. Rehill, 306 N. Y. 126 (1953) 11
Rose v. Rose, 34 O. App. 89 (1929) 11
Schacht v. Schacht, 295 N. Y. 439 (1946) 11
Sheard v. Green, 219 La. 199 (1951) 11
Sherrer v. Sherrer, 334 U. S. 343 (1948) 11
Sistare v. Sistare, 218 U. S. 1 (1910) 11
Snoderly v. Brown and Firestone Bank, 56 O. L. A. 47 (Ct. App. 1949) 10
Sponseller v. Sponseller, 110 O. S. 395 (1924) 12
State v. Brewer, 155 O. S. 203, 205 (1951) 11
State v. Telegraph Co., 154 O. S. 511 (1951) 6
State, ex rel. v. Westlake, 154 O. S. 412 (1951) 6
State, ex rel. Barner v. Marsh, 121 O. S. 321 (1929) 8
Steffens v. Steffens, 408 Ill. 150 (1951) 11
United States v. Throckmorton, 98 U. S. 61 (1878) 11
Wallinan v. Hughes, 196 Va. 117 (1954) 11
Ward v. Ward, 63 O. S. 125 (1900) 11
Williams v. North Carolina, 317 U. S. 287 (1942) 11
Williams v. North Carolina, 324 U. S. 226, 229 (1945) 11
Yappel v. Mozina, 33 O. App. 371 (1929) 10
Yendes v. Shaw, 83 O. App. 300 (1948) 10

OTHER AUTHORITIES

Ohio Constitution, Sec. 2, Article V 5
19 O. Jur. 352, Fraud & Deceit, Sec. 46 10
21 O. Jur. 376, Husband & Wife, Sec. 51 11
3 O. Jur. (2d) Sec. 680, pp. 629-631 6
3 O. Jur. (2d) 546, Sec. 608, App. Rev. 6

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The writ should not be allowed, because the "Questions Presented," "Statement of the Case," "How Federal Question Is" (said to be) "Presented" and the supposed "Reasons for Granting the Writ," as set out in the petition, are incorrect, incomplete and furnish no ground for allowance of certiorari. Especially, not disclosed from these is the fact the judgment of the Ohio Supreme Court sought to be reviewed may have been and presumably was rested on a tenable non-federal ground; and, hence, will not be reviewed by this Court.

STATEMENT

For a number of the allegations in the petition, no rec
reference is, or can be, supplied. We shall not attempt
point out all of these nor to show their incorrectness.
present, however, some salient facts which, of themselv
demonstrate this is not a suitable case for allowance o
writ:

In the "Memorandum" opinion of the Common Pl
Judge of Hamilton County, Ohio (Pet. App. A, 1a), i
brief summary of the amended petition and of defendar
(respondent's) motion for judgment on the pleadings a
the opening statement of counsel for plaintiff (id. 3
Grounds 1 and 5 of this motion are non-federal, sett
up, 1, lack of tender, and, 5, there was no fraud. T
Court's opinion said (id. 3a bot.):

> "In view of the conclusion reached with regard
> the second ground of defendant's motion, it will
> unnecessary to discuss the other propositions advan
> therein."

This second was the full faith and credit ground, and w
that on which the Court's decision sustained the mot
to dismiss the case.

The judgment of the trial Court, however, did not co
port with this decision. It found the grounds of
motion, other than the second, not well taken and ov
ruled defendant's motion to that extent (Pet. App.
5a, 6a). Defendant excepted

> "to the overruling in part of said motion for ju
> ment on the pleadings and on the opening sta
> ment . . ." (id. 6a, last sentence).

After the plaintiff, petitioner here, had appealed
questions of law to the Ohio Court of Appeals, First
pellate District, respondent filed cross assignments

error there as permitted by Revised Code of Ohio, Sec. 2505.22:

> "Assignments of error may be filed on behalf of an appellee which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part. . . ."

Rule VII of the Court of Appeals provides in part:

> "Within fifteen (15) days after the filing of the appellant's brief, counsel for appellee shall file like brief and also, at his election, assignment of errors on his behalf. . . . The appellee's brief shall include such reasons and authorities in support of his assignments of error, as he may desire as well as an answer to appellant's brief. The appellant's reply brief may cover all matter in the appellee's brief."

Respondent's (defendant appellee in the Ohio Court of Appeals) assignment of errors is (according to the Rule 21(1) notice) in the record submitted by petitioner. The defendant could not and did not attempt to cross appeal, since he could not appeal from a final judgment in his favor, whatever were the reasons assigned for his winning the case.

Neither the opinion of the Ohio Court of Appeals (Pet. App. C, 7a) nor its judgment (Pet. App. D, 8a) shows the ground or grounds on which that Court affirmed the judgment below. It is impossible to say with certainty, therefore, whether that judgment rests on a federal or non-federal ground. Petitioner here did not apply to the Court to have its opinion or judgment made more specific. So, with a general judgment, she left in force the presumption that, where a judgment might have been based on a federal or non-federal ground involved in the issues, it is based on the non-federal ground.

In the printed brief in the Supreme Court of Ohio, first point under "ARGUMENT" (p. 3) in support defendant-appellee's motion to dismiss and in opposit to motion to certify is:

> "I. An appeal of right to this Court will be missed where the case can be and may have b disposed of without considering any constitutio question."

The other points made were:

> "II. The Illinois divorce decree incorporating settlement agreement is entitled to full faith credit and is conclusive.
> "III. Plaintiff cannot maintain this action beca she has not tendered to defendant the considerat received for the settlement agreement she is atten ing to set aside.
> "IV. On the basis of allegations in the amen petition and the opening statement no actiona fraud is shown."

The orders of the Ohio Supreme Court refusing p tioner's motion to certify and dismissing the appeal a right on claim of constitutional question are not prin by petitioner (Cfr. this Court's Rule 24 [1] [j]). T Court does not assign reasons for allowance or disall ance of motion to certify; and the judgment of dismi was "for the reason that no debatable constitutional q tion is involved" (163 O. S. 230). The headnote of opinion reproduced in Appendix E of the petition her not that of the Court, but of the reporter. It inclu however, "—*Equitable Relief*—", a somewhat cryptic pression, but doubtless intended to show a sustaining the decision of contention by appellee that before equit

relief, such as avoidance of a voidable contract, may be had, the seeker must have done equity and made tender back of what was received under the contract attacked.

Again, in the Supreme Court of Ohio, since there was no showing in either the opinion or judgment, of the court's ground for these, it will be presumed, then, the motion to certify was overruled on the ground no error had intervened and the case was not one "of public or great general interest" (Ohio Constitution, Sec. 2, Article V); and the appeal of right was dismissed because the judgment appealed from could have been and presumptively was rested on non-federal grounds.

So, the only question really presented is:

Where in a state court the issues include both federal and non-federal questions and the judgment of the highest court of the state is general for the defendant, without any specification of ground on which the judgment is rested, will a petition for writ of certiorari be entertained?

Respondent says the answer to this question is "No." We submit, therefore, nothing further need be added in opposition to allowance of the petition for the writ, and that it should be denied. At the risk of 'painting the lily,' however, we append the following which the Court may or may not care to read:

ARGUMENT

I. The Judgment of the Ohio Supreme Court Was General and Might Have Been and Presumably Was Based on an Arguable Non-Federal Ground of Defense. So, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained.

Ellis v. *Dixon*, 349 U. S. 458, 75 S. Ct. 850 (1955). *Peters* v. *Hobby, et al.*, 348 U. S. 882 (1955).

In *Kut* v. *Bureau of Workmen's Compensation*, 329 U. S. 669 (1946), an appeal from a judgment of the Ohio

Supreme Court was dismissed on the ground it was or could have been based upon a non-federal ground adequate to support it. A late case is, *Cantrell* v. *City of Caruthersville*, 222 F. (2d) 428, 429 (C. A. 8th, 1955). In Ohio, a reviewing court will look into the record and if the judgment under review is right for any reason, will affirm it, no matter what reasons the lower court may have assigned for its judgment. *Mulcahy* v. *Akron*, 111 O. S. 836 (1924); *Lape* v. *Lape*, 99 O. S. 143, 151 (1918); *Pritz* v. *Messer*, 112 O. S. 628 (1925).

The presumption is the Supreme Court of Ohio did not decide the constitutional issue, since it is a recognized principle of law in Ohio, as in this Court and elsewhere, that constitutional questions will not be decided until the necessity for their decision arises. *State* v. *Telegraph Co.*, 154 O. S. 511 (1951); *State, ex rel.* v. *Westlake*, 154 O. S. 412 (1951).

In addition, since the case could have been decided on other grounds which are equally correct, it will be presumed that the court decided the case on one or more of such grounds. The situation is analogous to the two-issue rule which was most recently recognized in *Centrello* v. *Basky*, 164 O. S. 41, pars. 4 and 8 syl., pp. 49, 53 (1955), 28 Ohio Bar, No. 29 (July 18, 1955), and in *Potter* v. *Baker*, 162 O. S. 488, 503 (1955), thus,

> ". . . The grounds upon which a judgment or ruling is placed are not the subject of review. The thing to be examined is the judgment or ruling itself and that may be entirely sound, even though the grounds upon which it is placed are wholly erroneous."

3 *O. Jur.* (2d), Sec. 680, pp. 629-630, note 19, and p. 631 and note 10.

Again, as stated in 3 *O. Jur.* (2d) 546, Sec. 608, App. Rev.:

> "An appeal on questions of law brought to the Supreme Court as a matter of right on the claim that a constitutional question is involved will be dismissed . . . if the record discloses that the case can be disposed of without entering upon the consideration of any constitutional question. . . ."

II. The Motion to Certify Should Be Overruled Because Lack of Tender and Claim of No Actionable Fraud Are Defenses Involving the State Law of Ohio and (A) An Action to Set Aside a Settlement, Release and Judgment Embodying Same Cannot Be Maintained Without Tender of the Consideration Received (Which Was Not Made Here); and (B) The Fraud Alleged Is (1) Substantially an Expression of Legal Opinion Only and (2) Not Something Plaintiff Had a Right to Rely On. Having Competent Legal Advice, She Was Bound to Know, Treating Her Allegations as True, the Trust Was a Fraudulent Assignment to Defeat Her Rights as a Creditor and Could Be Set Aside for That Reason.

(A) Par. 17 (p. 8) of plaintiff's amended petition relating to tender shows she made none and that she was willing to allow the money she received only as a credit if she was granted more from the Court than was agreed to and obtained in the settlement decree. She avers she had left only $38,250.00;

> "but that she is willing to allow the amount of money received by her as aforesaid as a credit upon such sum as shall be determined by the Court herein to be properly paid and awarded to her over and above said $110,000.00."

The sixth defense of defendant's answer to the amended petition pleads lack of tender of the $110,000.00, and of $750.00, and of furniture, furnishings and effects, of a value of at least $5,000.00, which the petitioner received in settlement of her claim for alimony. Her reply, V, says:

> "For reply to the Sixth Defense, Plaintiff denies that she is required to tender back to defendant any monies received from him pursuant to said alimony agreement, but avers that this court has jurisdiction to render all equitable relief to which Plaintiff may be entitled."

The sixth paragraph of the syllabus of *State, ex rel. Barner* v. *Marsh*, 121 O. S. 321 (1929), which involved an attempt to set aside an alimony settlement in a divorce case, reads:

> "Where a party has received and accepted the fruits and benefits of a judgment in his favor, he will not be heard to challenge the validity of such judgment without first restoring or offering to restore such fruits and benefits to the adverse party."

In Ohio, the syllabus is the law of the case. The rule of the Ohio Supreme Court establishing this reads, in part:

> "RULE VI
> "POINTS DECIDED
>
> "In each cause a syllabus of the points decided by the Court, shall be stated in writing by the Judge assigned to prepare the opinion of the Court. Such syllabus shall be confined to the points of law arising from the facts of the cause as determined by the Court. . . ."

Page's Ohio Revised Code Annotated, Titles 25, 27, p. 62. See, also, reporter's note in 94 O. S. p. ix, 1917:

> "There can be no question, . . . that in cases bearing a date subsequent to February 1, 1858, the syllabus is the law of the case."

The petitioner here is seeking to have set aside part of an agreement and decree which she obtained as plaintiff. This

decree calls for a lump sum payment and other considerations, and contains no reservation of continuing jurisdiction over the parties.

See, also, *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 155 O. S. 185 (1951); *Lees* v. *Akshun Mfg. Co.*, 205 F. (2d) 577, 583 (C. A. 7th, 1953); *In re Estate of Gray*, 162 O. S. 384, 391 (1954), citing *Picklesimer* v. *B. & O. R. R. Co.*, 151 O. S. 1 (1949).

In *In re Estate of Gray*, it was decided that where there is, as was the fact in the present case, a genuine dispute as to what the plaintiff should have gotten, in every such case, a tender is a prerequisite to relief. The doctrine of tender back applies to releases whether given for claims for torts or in connection with contracts. The first paragraph of the syllabus in *Cross* v. *Ledford*, 161 O. S. 469 (1954) reads:

> "Where a contract has been procured by fraudulent representations of a party thereto, the party defrauded after offering to return what he has received under the contract, may elect to have the contract set aside and be restored to his original position."

In *Babcock* v. *Farwell*, 245 Ill. 14 (1910), the fourth paragraph of the headnote reads:

> "The inability of the party to restore the consideration for a contract which he seeks to rescind will not relieve him from the necessity of doing so, and it is not sufficient to offer to set off the amount against what is claimed from the other party."

The seventh paragraph of the headnote reads:

> "A release procured by fraud as to the consideration is binding until set aside in equity, and the party executing it cannot be relieved from it without returning the consideration."

The judgment of the Common Pleas Court in this c
(App. B, 6a), finding all grounds of the motion for ju
ment on the pleadings and the opening statement not
taken except the federal full faith and credit defense
not only at variance with its opinion (id. 3a), but with
settled applicable law of Ohio, which governs and nece
tated a ruling plaintiff's action had to be dismissed beca
indisputably, plaintiff, in the trial court, made no ten
This Ohio law was doubtless adhered to as a ground
the judgments of the appellate and Supreme Court
Ohio.

(B) Of the accusations in the trial court amended p
tion and in the petition here aimed at respondent and
present counsel (not such at the time the trust was m
in October 1945), these are denied in the answer to
amended petition and some are not supported by the pl
ings and opening statement. Some, however, have to
treated as true for purposes of the motion to dism
But, so treated, they are immaterial because of the c
plete defense of no tender, shown in (A). Moreover,
they were substantially mere expressions of legal opi
of defendant's to plaintiff's attorneys and not a re
sentation of material facts. Expressions of legal con
sions are not a basis for actionable fraud.

In 19 *O. Jur.* 352, Fraud and Deceit, Sec. 46, it is sta

> "An opinion as to the plaintiff's legal rights is n
> representation of fact,"

citing *Aetna Ins. Co.* v. *Reed*, 33 O. S. 283 (1877). See, a
Yappel v. *Mozina*, 33 O. App. 371 (1929); *Yendes* v. *Sh*
83 O. App. 300 (1948); *Snoderly* v. *Brown and Firest*
Bank, 56 O. L. A. 47 (Ct. App. 1949).

(2) Finally, on this branch of the case, fraudu
representations, if made, were immaterial, because no

jury resulted therefrom. Since the wife was a creditor, the trust prevented her from satisfying her just demands for property and support and was, therefore, a conveyance in fraud of her as a creditor and she could set it aside for that reason alone. *Atkinson* v. *Jordan*, 5 Ohio 293 (1832); *Ward* v. *Ward*, 63 O. S. 125 (1900); 21 *O. Jur.* 376, Husband and Wife, Sec. 51; *Rose* v. *Rose*, 34 O. App. 89 (1929); *Hays* v. *Lindquist*, 22 O. App. 58 (1926); *Franceschi* v. *Franceschi*, 326 Ill. App. 494 (1945).

III. The Federal Question If Presented for Consideration, Lacks Merit, Is Unsubstantial and Not Debatable. The Fraud Alleged Is Intrinsic and the Decree May Not Be Attacked for Intrinsic Fraud.

United States v. *Throckmorton*, 98 U. S. 61 (1878); *Sistare* v. *Sistare*, 218 U. S. 1 (1910); *Williams* v. *North Carolina*, 317 U. S. 287 (1942); *Williams* v. *North Carolina*, 324 U. S. 226, 229 (1945); *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948); *Coe* v. *Coe*, 334 U. S. 378 (1948); *Johnson* v. *Muelberger*, 340 U. S. 581 (1951); *Durham* v. *New Amsterdam Cas. Co.*, 208 F. (2d) 342 (C. A. 4th, 1953). See, also, *Adler* v. *Adler*, 373 Ill. 361 (1940); *Forrest* v. *Fey*, 218 Ill. 165 (1905); *Steffens* v. *Steffens*, 408 Ill. 150 (1951); *Barnard* v. *Michael*, 392 Ill. 130 (1945); *State* v. *Brewer*, 155 O. S. 203, 205 (1951); *Michael* v. *American National Bank*, 84 O. S. 370 (1911); *Rehill* v. *Rehill*, 306 N. Y. 126 (1953); *Nichols* v. *Nichols*, 306 N. Y. 490 (1954); *Schacht* v. *Schacht*, 295 N. Y. 439 (1946); *Sheard* v. *Green*, 219 La. 199 (1951); *Wallinan* v. *Hughes*, 196 Va. 117 (1954).

A consent decree embodying an agreement relating to alimony and all property rights of spouses, particularly where, as here, there is no reservation of jurisdiction over the parties in it, is just as final, binding and conclusive as a decree resulting after contest of such matters. *Lawlor* v. *National Screen Service Corporation*, 349 U. S. 322;

75 S. Ct. 865, 868 (1955), affirming 211 F. (2d) 934 (C. A. 3, 1954); *Sponseller* v. *Sponseller*, 110 O. S. 395 (1924).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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